

STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION

04.30-098994A

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The two above captioned matters came to be heard before the Tennessee Water Quality Control Board (hereinafter the "Board") upon the Commissioner's issuance of the Order and Assessment in these matters and the Petitions to Appeal filed by Respondents Rarity Communities, Inc., Tellico Landing, LLC, Oak Ridge Land Company, LLC, and Gary Consorto and the representation of counsel that an agreement and settlement has been reached as to these Respondents. The Respondents enter into this Agreed Order solely for reasons of compromise of the pending claims, to avoid costly litigation, and in order to fully cooperate with the State of Tennessee in these matters. The Board therefore adopts the following findings of fact and conclusions of law and order and assessment to which the parties have agreed, subject to the

Respondents' Reservation of Rights set forth herein, as is shown by signature of counsel in settlement of Case No. 06-0368 and Case No. WCP 07-092.

PARTIES

I.

James H. Fyke is the duly appointed Commissioner of the Tennessee Department of Environment and Conservation (hereinafter "Department" or "TDEC").

II.

The Respondents in the two above captioned matters are, variously, Rarity Communities, Inc., Tellico Landing, LLC, Oak Ridge Land Company, LLC, and Gary Consorto (hereinafter all referred to collectively as "Respondents"). This Agreed Order is not intended and does not resolve any liabilities associated with Sharp Contracting, Inc.'s involvement in Case No. 06-0368.

III.

Rarity Communities, Inc. (hereinafter "Respondent Rarity") is an active for-profit corporation licensed to conduct business in the State of Tennessee. Respondent Rarity is developing a planned residential community in Loudon County named Rarity Pointe which is the subject matter of Case No. 06-0368 (hereinafter "Rarity Pointe matter"). Respondent Rarity is also developing a subdivision in Roane County, Tennessee, named Rarity Oaks, which is the subject matter of Case No. WPC 07-092 (hereinafter "Rarity Oaks matter"). Service of process may be made on Respondent Rarity through Michael L. Ross, Registered Agent, at 2624 Carpenters Grade Road, Maryville, Tennessee 37803.

IV.

Tellico Landing, LLC (hereinafter "Respondent Tellico Landing") is developing the subdivision named Rarity Pointe and is listed as an active limited liability company licensed to conduct business in the State of Tennessee. Service of process may be made on Respondent Tellico Landing through Michael L. Ross, Registered Agent, at 100 Rarity Bay Parkway, Vonore, Tennessee 37885.

V.

Oak Ridge Land Company, LLC (hereinafter "Respondent Oak Ridge Land Company") is an active limited liability company licensed to conduct business in the State of Tennessee and is the owner and developer of Rarity Oaks subdivision, a residential subdivision located along Highway 95 (Oak Ridge Turnpike) and southwest of Oak Ridge in Roane County, Tennessee. Service of process may be made on the Respondent Oak Ridge Land Company through Michael L. Ross, Registered Agent, at 2624 Carpenters Grade Road, Maryville, Tennessee 37803.

VI.

Gary Consorto (hereinafter "Respondent Consorto") is a resident of the State of Tennessee and is the signatory authority for Respondent Oak Ridge Land Company and Respondent Rarity and is listed as Vice President, Construction, for these Respondents. Respondent Consorto was acting in his official capacity as Vice President of Respondent Rarity with respect to all matters pertaining to this Agreed Order. Service of process may be made on Respondent Consorto at 1010 William Blount Dr., Maryville, Tennessee 37801.

JURISDICTION

VII.

Whenever the Commissioner has reason to believe that a violation of Tennessee Code Annotated ("T.C.A.") §§ 69-3-101, *et seq.*, the Water Quality Control Act (hereinafter the "Act"), has occurred, or is about to occur, the Commissioner may issue a complaint to the violator and may order that corrective action be taken pursuant to T.C.A. § 69-3-109(a) of the Act. Further, the Commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. § 69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. § 69-3-116 of the Act. Department Rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. § 69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (hereinafter "Rule"). Pursuant to T.C.A. § 69-3-107(13), the Commissioner may delegate to the Director of the Division of Water Pollution Control ("Division") any of the powers, duties, and responsibilities of the Commissioner under the Act.

VIII.

Respondent Rarity, Respondent Tellico Landing, Respondent Oak Ridge Land Company, and Respondent Consorto are each "persons" as defined in T.C.A. § 69-3-103(20) and, as herein described, have violated the Act.

IX.

For the Rarity Point matter (Case No. 06-0368), Tellico Lake and its unnamed tributaries are referred to herein as "waters of the state", as defined in T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, "Use Classifications for Surface Waters", is contained in the *Official Compilation Rules and Regulations of the State of Tennessee*. Accordingly, Tellico Lake has been classified for the following uses: domestic water supply, industrial water supply, navigation, fish and aquatic life, recreation, irrigation, and livestock watering and wildlife. The unnamed tributaries have been classified for the following uses: fish and aquatic life, recreation, irrigation, and livestock watering and wildlife.

X.

For the Rarity Oaks matter (Case No. WPC 07-092), East Poplar Creek and Pinhook Branch are referred to herein as "waters of the state", as defined in T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, "Use Classifications for Surface Waters", is contained in the *Official Compilation Rules and Regulations of the State of Tennessee*. Accordingly, these waters of the state have been classified for the following uses: fish and aquatic life, recreation, irrigation, and livestock watering and wildlife. Additionally, East Fork Poplar Creek is listed as being impaired due to siltation.

XI.

Tennessee Code Annotated § 69-3-108 requires a person to obtain coverage under a permit from the Department prior to discharging any substance to waters of the state, or to a location from which it is likely that the discharged substance will move to waters of the state. Coverage under the general permit for Storm Water Discharges Associated with Construction Activity (hereinafter the "TNCGP") may be obtained by submittal of a Notice of Intent ("NOI"). Further, pursuant to T.C.A. § 69-3-108, Rule 1200-4-7-.04 requires a person to submit an application prior to engaging in any activity that requires an Aquatic Resource Alteration Permit ("ARAP") that is not governed by a general permit or a § 401 Water Quality Certification. No activity may be authorized unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value.

FACTS

XII.

The Facts as set forth in Sections IX through XXXIV of the Commissioner's Order and Assessment (dated April 13, 2007) in the Rarity Pointe matter (Case No. 06-0368) (which is attached to this Agreed Order as Exhibit A) are incorporated herein by reference.

XIII.

The Facts as set forth in Sections IX through XV of the Commissioner's Order and Assessment (dated June 12, 2007) in the Rarity Oaks matter (Case No. WPC 07-092) (which is attached to this Agreed Order as Exhibit B) are incorporated herein by reference.

VIOLATIONS

XIV.

For the Rarity Pointe matter (Case No. 06-0368), in failing to install and maintain adequate sediment and erosion control measures to control storm water runoff as required by the TNCGP, as described herein, Respondent Rarity and Respondent Tellico Landing have violated T.C.A. § 69-3-108(b) and § 69-3-114(b).

T.C.A. § 69-3-108(b) states:

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

(1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;

...

(6) The discharge of sewage, industrial wastes, or other wastes into water, or a location from which it is likely that the discharged substances will move into waters;

T.C.A. § 69-3-114(b) states:

(b) In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provision of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

XV.

Further, in the Rarity Pointe matter (Case No. 06-0368), by conducting activities without a permit as described herein, Respondent Rarity and Responding Tellico Landing have violated T.C.A. § 69-3-108(a).

T.C.A. § 69-3-108(a) states:

(a) Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.

XVI.

Further, in the Rarity Pointe matter (Case No. 06-0368), by causing a condition of pollution to waters of the state, as described herein, Respondent Rarity and Respondent Tellico Landing have violated T.C.A. § 69-3-114(a).

T.C.A. § 69-3-114(a) states:

(a) It shall be unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in § 69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

T.C.A. § 69-3-103(22) provides:

(22) "Pollution" means such alteration of the physical, chemical, biological, bacteriological, or radiological properties of the waters of the state including but not limited to changes in temperature, taste, color, turbidity, or odor of the waters:

- (A) As will result or will likely result in harm, potential harm or detriment of the public health, safety, or welfare;
- (B) As will result or will likely result in harm, potential harm or detriment of the health of animals, birds, fish or aquatic life;
- (C) As will render or will likely render the waters substantially less useful for domestic, municipal, industrial, recreational, or other reasonable uses; or
- (D) As will leave or will likely leave the waters in such condition as to violate any standards of water quality established by the board.

XVII.

For the Rarity Oaks matter (Case No. WPC 07-092), by altering waters of the state without coverage of an ARAP and by conducting land disturbance activities without coverage under the TNCGP, Respondent Rarity, Respondent Oak Ridge Land Company, and Respondent Consorto have violated T.C.A. § 69-3-108(a) & (b) and § 69-3-114(b) as referenced above.

XVIII.

For the Rarity Oaks matter (Case No. WPC 07-092), by failing to properly install and maintain erosion prevention and sediment control ("EPSC") measures prior to land disturbance, the activity described herein did or was likely to cause an increase in the discharge of wastes into the waters of the state. Therefore, Respondent Rarity, Respondent Oak Ridge Land Company, and Respondent Consorto have violated T.C.A. § 69-3-108(b) and § 69-3-114(b) as referenced above.

IXX.

For the Rarity Oaks matter (Case No. WPC 07-092), by discharging materials or wastewater without coverage under a permit, Respondent Rarity, Respondent Oak Ridge Land Company, and Respondent Consorto have violated T.C.A. § 69-3-108(a) & (b) and § 69-3-114(b) as referenced above.

XX.

For the Rarity Oaks matter (Case No. WPC 07-092), by altering waters of the state without authorization under an ARAP, Respondent Rarity, Respondent Oak Ridge

Land Company, and Respondent Consorto have violated T.C.A. § 69-3-108(a) & (b) and § 69-3-114(b) as referenced above.

XXI.

For the Rarity Oaks matter (Case No. WPC 07-092), by causing a condition of pollution to Pinhook Branch and East Fork Poplar Creek, Respondent Rarity, Respondent Oak Ridge Land Company, and Respondent Consorto have violated T.C.A. § 69-3-114(a) as referenced above.

AGREED ORDER AND ASSESSMENT

XXII.

WHEREFORE, PREMISES CONSIDERED, it is ORDERED by the Board that:

1. Respondent Rarity and Respondent Tellico Landing have complied with the corrective actions set forth in Sections XXXIX (1) through (7) of the Commissioner's Order in the Rarity Pointe matter (Case No. 06-0368) (see attached Exhibit A).
2. Respondent Rarity, Respondent Oak Ridge Land Company, and Respondent Consorto have complied with the corrective actions set forth in Sections XXII (1) through (6) of the Commissioner's Order in the Rarity Oaks matter (Case No. WPC 07-092) (see attached Exhibit B).
3. The Respondents shall maintain appropriately designed erosion and sediment controls at both Rarity Pointe and Rarity Oaks until permanent stabilization of the sites is established pursuant to the TNGCP.
4. Respondents shall conduct the following activities at all Phases of the Rarity Rivers site in Meigs County, Tennessee.

- a.) Respondents will obtain coverage under the TNCGP prior to any land disturbance activities.
- b.) Respondents will comply with all provisions of TNCGP except as superseded by 4.c-g, below.
- c.) Maximum land disturbance at any one time will be 50 acres or less. The Rarity Rivers site will maintain a log describing the construction activity, the date started, number of acres, date of temporary stabilization, and date of final stabilization. This log must be kept on site and available for review by TDEC upon request.
- d.) Daily inspection of all best management practices ("BMPs") and EPSCs must be conducted to assure compliance with the requirements of the general permit, and by a person who has maintained certification under the "Fundamentals of Erosion Prevention and Sediment Control" course.
- e.) Each storm water outfall of a drainage area less than five (5) acres shall be protected by a settling trap and erosion prevention and sediment controls. Each storm water outfall of a drainage area equal to or greater than five (5) acres shall be protected by a settling basin and erosion prevention and sediment controls. The settling traps, basins and erosion prevention and sediment controls shall be designed according to the TDEC's Erosion Prevention and Sediment Control Manual to control storm water runoff generated by a 10-year, 24-hour storm event.
- f.) Rarity Rivers must demonstrate that sewage generated by the subdivision will be properly treated and disposed prior to obtaining TNCGP coverage.

- g.) A professional engineer, a professional geologist, or a landscape architect, licensed in the State of Tennessee, and either responsible for the design of the SWPPP or familiar with the overall design and SWPPP, must perform an inspection once per week at the Rarity Rivers site. The inspection must be documented as required in the TNCGP, and submitted weekly to the Division's Chattanooga Environmental Field Office ("EFO-CH") over the signature of the inspector. The weekly report shall include a summary of the daily inspections.
- h.) Organic material, which is to be burned at the Rarity Rivers site, must be combusted in a pit with a stoker or blower and according to local open burning regulations to minimize the amount of ash generated, in order to avoid water pollution.
5. Respondents shall pay DAMAGES to the Division in the amount of TWO THOUSAND FIVE HUNDRED NINE DOLLARS AND THIRTY-FIVE CENTS (\$2,509.35).
6. Respondents shall pay to the Division a CIVIL PENALTY in the amount of ONE HUNDRED TWENTY THOUSAND DOLLARS (\$120,000.00). In lieu of paying said civil penalty, Rarity may submit one or more Supplemental Environmental Projects ("SEP") in a total amount up to TWO HUNDRED FORTY THOUSAND DOLLARS (\$240,000.00) within THIRTY (30) DAYS of the entry of this Agreed Order to be approved by the Director of the Division of Water Pollution Control within ONE HUNDRED AND EIGHTY (180) DAYS from the submittal of the SEP(s). The Division Director has the discretion to authorize the submission of alternative or substitute SEP proposals within the

referenced 180 day period; provided, however, this shall not extend the 180 day deadline for the Director's approval for any SEP(s) that has been submitted. The value of any approved SEP(s) will be applied in a 2 to 1 ratio against said civil penalty. If the value of the approved SEP(s) is an amount less than \$240,000.00, one-half (1/2) of the value of the approved SEP(s) will be applied against said civil penalty with the remainder of the civil penalty becoming due and payable upon the expiration of said 180 day period. In the event that the Director fails to approve any SEP(s), the full amount of the civil penalty (\$120,000.00) will become due and payable upon the expiration of said 180 day period.

7. The Respondent shall pay stipulated CIVIL PENALTIES for violations of paragraphs 3 and 4 above according to the following schedule:

- a) If the Respondent fails to comply with paragraph 3 above then the Director may assess a penalty of One Thousand Dollars (\$1000.00) per day until such default (which is defined as a violation of the provisions of the TNGCP currently covering those sites and relating to EPSC, or any renewal of said permit) is corrected. If the failure to comply with paragraph 3 results in a condition of pollution the Director may assess a penalty of Two Thousand Five Hundred Dollars (\$2,500.00) per day until such default is corrected.

- b) If the Respondent fails to comply with paragraph 4(a) above then the Director may assess a penalty of Two Thousand Five Hundred Dollars (\$2,500.00) per day until such default is corrected.

- c) If the Respondent fails to comply with paragraph 4(b) above then the Director may assess a penalty of One Thousand Dollars (\$1000.00) per day until such default (which is defined as a violation of the provisions of the TNGCP which is issued to cover the Rarity Rivers site) is corrected. If the failure to comply with paragraph 4(b) results in a condition of pollution the Director may assess a penalty of Two Thousand Five Hundred Dollars (\$2,500.00) per day until such default is corrected.
- d) If the Respondent fails to comply with paragraph 4(c) above then the Director may assess a penalty of One Thousand Dollars (\$1,000.00) per day until such default is corrected.
- e) If the Respondent fails to comply with paragraph 4(d) above then the Director may assess a penalty of One Thousand Five Hundred Dollars (\$1,000.00) per day until such default is corrected.
- f) If the Respondent fails to comply with paragraph 4(e) above then the Director may assess a penalty of One Thousand Dollars (\$1000.00) per day until such default is corrected. If the failure to comply with paragraph 4(e) results in a condition of pollution the Director may assess a penalty of Two Thousand Five Hundred Dollars (\$2,500.00) per day until such default is corrected.
- g) If the Respondent fails to comply with paragraph 4(g) above then the Director may assess a penalty of Five Hundred Dollars (\$500.00) per day until such default is corrected.

h) If the Respondent fails to comply with paragraph 4(h) above then the Director may assess a penalty of Five Hundred Dollars (\$500.00) per day until such default is corrected.

8. Respondents shall otherwise conduct their business in accordance with the Act and Rules promulgated pursuant to the Act.

Further, Respondents are advised that the foregoing Agreed Order is in no way to be construed as a waiver, expressed or implied, of any provision of law or regulations. However, compliance with the Agreed Order will be one factor considered in any decision whether to take enforcement action against Respondents in the future.

DIRECTOR'S AUTHORITY

1. The director of the Division of Water Pollution Control may upon written notice cause all work to stop at the Rarity Rivers site by the Respondents for violations of this Agreed Order or violations of the Water Quality Control Act §69-3-101 et seq at the Rarity Rivers site.
2. The director of the Division of Water Pollution Control may, for good cause shown, waive the requirements, or any portions thereof, contained in paragraphs 4 (a) - (g) contained within this Agreed Order. In order to be eligible for this waiver, the Respondent shall submit a written request 30 days prior to the due date of the requirement. The request must include sufficient detail to justify such a waiver.

RESERVATION OF RIGHTS

Respondent Rarity, Respondent Tellico Landing, Respondent Oak Ridge Land Company, and Respondent Consorto do not admit or agree to the factual allegations or the alleged violations of law contained in this Agreed Order. Respondent Rarity, Respondent Tellico Landing, Respondent Oak Ridge Land Company, and Respondent Consorto agree to comply with this Agreed Order to avoid the cost of protracted litigation. Respondent Rarity, Respondent Tellico Landing, Respondent Oak Ridge Land Company, and Respondent Consorto reserve their rights to contest the factual allegations and alleged violations contained in this Agreed Order in any proceeding other than a proceeding brought by TDEC to enforce the terms of this Agreed Order.

REASONS FOR DECISION

The above Findings of Fact and Conclusions of Law, and the Agreed Order and Assessment contained herein, are reflective of an appropriate enforcement response necessary to address the water quality matters alleged herein. The Board encourages settling cases in the interest of avoiding the time and expense of prolonged litigation. The Board makes its findings of fact and violations of law based upon the investigation of staff.

A copy of this FINAL DECISION AND ORDER shall be served upon Respondent Rarity, Respondent Tellico Landing, Respondent Oak Ridge Land Company, and Respondent Consorto by certified mail, return receipt requested. This FINAL DECISION AND ORDER shall become effective upon entry by the Office of Secretary of State, Administrative Procedures Division.

Payment of Damages and Penalties

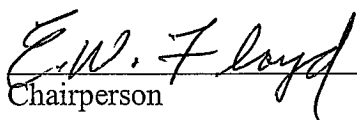
Payment of damages and penalties assessed by this Order should be paid within 30 days of receipt of the Order. Payment should be made to "Treasurer, State of Tennessee" and shall be sent to the Division of Fiscal Services, Consolidated Fees Section, 14th Floor, L&C Tower, Nashville, TN 37243. The case numbers 06-0368 and WPC07-092 should be listed on the check to ensure proper credit.

WAIVER OF APPEAL

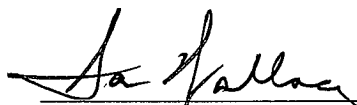
Respondent Rarity, Respondent Tellico Landing, Respondent Oak Ridge Land Company, and Respondent Consorto knowingly and voluntarily waive their Rights to Appeal and judicial review of this Agreed Order, which is a FINAL DECISION AND ORDER of the Board.

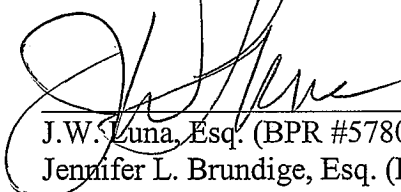
FOR THE TENNESSEE WATER QUALITY CONTROL BOARD:

This 20 day of May, 2008.


Chairperson


APPROVED FOR ENTRY:


Sam Wallace, Esq. (BPR #5207)
Assistant General Counsel


J.W. Luna, Esq. (BPR #5780)
Jennifer L. Brundige, Esq. (BPR #20673)
Farmer & Luna, PLLC
Attorneys for Respondents

ENTRY OF ORDER

Entered in the Office of the Secretary of State, Administrative Procedures Division, this 21st day of May, 2008.


Thomas G. Stovall
Administrative Procedures Division

STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION

IN THE MATTER OF:)	DIVISION OF WATER
)	POLLUTION CONTROL
)	
TELLICO LANDING, LLC AND)	
SHARP CONTRACTING, INC.)	CASE NO. 06-0368
AND RARITY COMMUNITIES,)	
INC.)	
)	
RESPONDENTS)	
)	

COMMISSIONER'S ORDER AND ASSESSMENT

NOW COMES James H. Fyke, Commissioner of the Tennessee Department of Environment and Conservation, and states:

PARTIES

I.

James H. Fyke is the duly appointed Commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "Department" or "TDEC").

II.

Rarity Communities, Inc. (hereinafter the "Respondent Rarity Communities") is developing five or more planned residential developments in eastern Tennessee, including a subdivision named Rarity Pointe in Loudon County near Latitude 35 degrees 45 minutes and longitude 84 degrees 15 minutes (hereinafter the "Site"), and is listed as an active for-profit corporation licensed to conduct business in the State of Tennessee.

EXHIBIT "A"

Service of process may be made on Respondent Rarity Communities, Inc. registered agent Michael L. Ross, 2624 Carpenters Grade Road, Maryville, Tennessee 37801.

III.

Tellico Landing, LLC (hereinafter the "Respondent Tellico") is specifically developing the subdivision named Rarity Pointe and is listed as an active limited liability company licensed to conduct business in the State of Tennessee. Service of process may be made on Respondent Tellico Landing registered agent Michael L. Ross, 100 Rarity Bay Parkway, Vonore, Tennessee 37885.

IV.

Sharp Contracting, Inc. (hereinafter the Respondent "Sharp") is the contractor listed on the Notice of Coverage (NOC) and is listed as an active corporation licensed to conduct business in the State of Tennessee. Service of Process may be made on Respondent Sharp Contracting, Inc. registered agent Carolyn Jo Leto Sharp at 235 South Old Glory Road, Maryville, Tennessee 37801.

JURISDICTION

V.

Whenever the Commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) §69-3-101 *et seq.*, the *Water Quality Control Act*, (hereinafter the "Act") has occurred, or is about to occur, the Commissioner may issue a complaint to the violator and may order that corrective action be taken, pursuant to T.C.A. §69-3-109(a) of the Act. Further, the Commissioner has authority to assess civil penalties

against any violator of the Act, pursuant to T.C.A. §69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. §69-3-116 of the Act. Department Rules governing general water quality criteria and use classifications for surface waters have been promulgated, pursuant to T.C.A. §69-3-105, and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (hereinafter the "Rule").

VI.

The Respondents Rarity Communities, Inc., Tellico Landing, LLC and Sharp Contracting, Inc. are each "persons" as defined at T.C.A. §69-3-103(20) and as herein described, have violated the Act.

VII.

Tellico Lake and its unnamed tributaries, referred to herein, are "waters of the state", as defined by T.C.A. §69-3-103(33). Pursuant to T.C.A. 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, "Use Classifications for Surface Waters", is contained in the *Official Compilation of Rules and Regulations for the State of Tennessee*. Accordingly, Tellico Lake has been classified for the following uses: domestic water supply, industrial water supply, navigation, fish and aquatic life, recreation, irrigation, and livestock watering and wildlife. The unnamed tributaries have been classified for the following uses: fish and aquatic life, recreation, irrigation, and livestock watering and wildlife.

VIII.

Tennessee Code Annotated § 69-3-108 requires a person to obtain coverage under a permit from the Department prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substance will move into waters of the state. Coverage under the Tennessee Construction General Permit for Storm Water Discharges Associated with Construction Activity (hereinafter the "TNCGP") may be obtained by submittal of a Notice of Intent (NOI). Pursuant to T.C.A. § 69-3-108, Rule 1200-4-7-.04 requires a person to submit an application prior to engaging in any activity that requires an Aquatic Resource Alteration Permit (ARAP) that is not governed by a general permit or a § 401 Water Quality Certification. No activity may be authorized unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value.

FACTS

IX.

The Rarity Pointe subdivision comprises approximately 716 acres of rolling hills on Tellico Lake, an impoundment of the Tellico and Little Tennessee Rivers. It is a planned luxury home and condominium community built around golf courses and a marina. The development is one of five planned Rarity Communities being built in eastern Tennessee by Respondent Rarity Communities.

X.

On April 10, 2002, Respondent Tellico applied for coverage under a TNCGP for phase one of the development as previously described in paragraph II (the "site"), which consisted of 90 acres.

XI.

On April 30, 2002, personnel from the Division of Water Pollution Control (the "Division") inspected the site and observed that construction on 25 acres had already begun prior to receiving coverage under the TNCGP. Roads had been cut and EPSC measures were inadequate.

XII.

A Compliance Review Meeting (CRM) was held on May 2, 2002, at the Knoxville Environmental Field Office (K-EFO). Permit requirements and appropriate EPSC measures and soil stabilization methods were discussed with Respondent Tellico and Respondent Sharp.

XIII.

A Notice of Violation (NOV) was issued to Respondent Tellico on May 2, 2002, and requested immediate implementation and maintenance of EPSC measures, submittal of a Storm Water Pollution Prevention Plan (SWPPP), and that all contractors on-site sign the NOI.

XIV.

The Division issued construction storm water coverage for 90 acres on this site under the TNCGP effective May 16, 2002, with an expiration date of May 31, 2005.

XV.

Division personnel inspected the site on June 26, 2002, and observed that no sign depicting a Notice of Coverage (NOC) was posted at the construction entrance and no SWPPP was available.

XVI.

On February 2, 2004, Respondent Tellico submitted a NOI for coverage under the TNCGP for an additional 175 acres (latitude 35 degrees 44 minutes 30 seconds and longitude 84 degrees 13 minutes 30 seconds and near Antioch Church Road/Highway US 231) adjacent to the original site to be developed into a golf course.

XVII.

On February 10, 2004, Division personnel inspected the site and observed that approximately 140 acres had been cleared prior to receiving coverage under the TNCGP. The Respondent stated that clearing at the golf course site had been ongoing since early December 2003. No EPSC measures were in place and sediment was observed deposited in inlets of Tellico Lake below the site.

XVIII.

The Division issued construction storm water coverage for an additional 175 acres on the golf course site under the TNCGP effective February 10, 2004 with an expiration date of May 31, 2005.

XIX.

The Division issued a second NOV and CRM request on February 17, 2004, for conducting activities without a valid permit and without EPSC measures in place. The NOV requested that construction be phased for projects in which over 50 acres of soil would be disturbed and that areas of the completed phase must be stabilized within 21 days after another phase has been initiated. The NOV requested immediate implementation and maintenance of EPSC measures and a submittal of a written response within 15 days of receipt of the NOV. A CRM was scheduled for March 9, 2004, at the Knoxville EFO.

XX.

On March 2, 2004 Respondent Tellico submitted a written response to the February 17, 2004, NOV on March 2, 2004. The letter stated that EPSCs were implemented immediately on February 10, 2004, and that inspections were being conducted in compliance with the TNCGP.

XXI.

A CRM was held on March 9, 2004, at the K- EFO to discuss the violations noted during the February 10, 2004, inspection with Respondents Tellico and Rarity Communities. Division personnel discussed the need to apply for Aquatic Resource Alteration Permits (ARAPs) before any alterations may be made to waters of the state. The 50-acre phasing requirement of the TNCGP was discussed, as well as the importance of implementation and maintenance of EPSCs.

XXII.

On March 19, 2004, Respondent Tellico submitted a response to the CRM. The letter included a plan to ensure that no more than 50 acres are exposed during a construction phase. Respondent Tellico stated that as acreage in each phase was stabilized, an equal amount of acreage in the next phase would begin.

XXIII.

On October 6, 2004, Division personnel conducted a site inspection. Division personnel asked Respondent Rarity Communities to show them the areas of the site where construction potentially affected waters of the state. During the inspection, TVA inspector Gary Pettway informed Division personnel it appeared that no streams remained due to siltation and/or culvertization.

Division personnel observed that construction encroached upon Tennessee Valley Authority (TVA) property and buffer zones. Silt fence was observed to be full of sediment and pushed down in areas and on the 17th fairway of the golf course site a 5-foot

culvert underneath the road was blown out in Phase II (the golf course site). Numerous erosion rills and gullies were observed on-site. Check dams were ineffective. Sediment was observed deposited in Tellico Lake. A cove near the 18th fairway had been partially filled in by sediment.

XXIV.

On February 25, 2005, Division personnel conducted an inspection at the original site and the golf course site. It was observed that large areas of exposed soil had been left unstable for over 6 months. The new road across from the golf maintenance building had a large erosion gully that carried sediment to a sediment trap in front of a wetland area on TVA property. Sediment was observed leaving the trap and entering Tellico Lake. A silt fence was observed overrun with sediment at the edge of the lake and construction debris was falling downhill and onto the shoreline, including tubes of caulk and sealant. A sediment trap near lots 175 and 218 of the original site was overflowing and had begun to fill in the back of the cove. Sediment from the two sites was observed entering the lake in at least 9 separate locations.

XXV.

On March 7, 2005, the Division issued a third NOV to Respondents Tellico and Rarity Communities describing the violations observed on both the October 6, 2004, and February 25, 2005, inspections. The NOV requested implementation and maintenance of EPSC measures.

XXVI.

The Division conducted a follow up inspection at the site on April 5, 2005, with Respondent Tellico and Respondent Sharp. EPSC implementation and maintenance had improved at the site but areas in need of further improvement were pointed out to the Respondents.

XXVII.

On August 4, 2005, Division personnel conducted a site visit and observed numerous areas with inadequate EPSC measures. Division personnel observed erosion undercutting silt fences placed beneath a source of concentrated flow. Silt fences placed below a large check dam were filled with and overrun with sediment. Division personnel noted a backhoe clearing and scraping right up to the waters edge, past a basin with geofibre and over the silt fence. Wooded area outside of the silt fence and other EPSCs was filled with sediment. Respondent Sharp would not sign the inspection form nor accept responsibility for the site.

XXVIII.

Another CRM was held with Respondent Tellico and Respondent Rarity Communities on August 12, 2005. The Division reviewed photographs of the water quality violations observed at the site and explained the enforcement process. Respondent Tellico and Respondent Rarity Communities produced a plan for temporary

and permanent seeding of the golf course and claimed that Respondent Sharp was responsible for the problems observed during the August 4, 2005, inspection.

XXIX.

On November 3, 2005, Division personnel conducted a site inspection and observed that large areas of exposed soil had no EPSC measures and the road along the lakeshore had continued to erode badly and no vegetation stabilized the bank. Outfalls along the cove east and north of an old cemetery on-site were still causing sediment deposition into the Tellico Lake. One spot had a peninsula of sediment approximately 15 to 20-feet wide and over a foot deep in the affected cove of Tellico Lake.

XXX.

On November 7, 2005, Division personnel met with Respondent Rarity Communities along with representatives from the U.S. Army Corps of Engineers (USACOE) and TVA to specify areas in need of corrective action. USACOE and TVA requested that the Respondents apply for permits to excavate and remove sediment that has entered TVA property and entered wetlands and Tellico Lake when the lake is at drawdown elevation during the winter.

XXXI.

On November 16, 2005, a fourth NOV was issued to Respondent Rarity Communities reiterating the need for permit applications to be submitted to the USACOE

and TVA to excavate and remove sediment that has entered TVA property and entered wetlands or Tellico Lake.

XXXII.

On February 9, 2006, Division personnel inspected the site and observed a steep slope at the end of the development that had collapsed. The outfalls which were pointed out to Respondent Rarity Communities at the last inspection continued to be problematic. Sediment from new road construction had filled check dams and overflowed into coves of Tellico Lake. The sediment in the coves and in the wooded areas and wetlands had not been removed and silt fence rows were overtopped with sediment in multiple locations on-site. Two of the large outfalls near Tellico Lake had muddy water flowing out of them.

XXXIII.

Division personnel conducted an inspection at the site on May 18, 2006, and observed multiple areas with silt fence and sediment traps overrun with sediment; these were some of the same areas that had been pointed out in the past as needing attention. An area of several hundred square yards near the development's water intake pump house was filled with fresh sediment one to three feet deep. The sediment that had washed into coves and was to be removed from the lake remained untouched.

XXXIV.

Division personnel conducted an inspection of both sites on October 17, 2006 and observed that there were still problems with permit violations, including sediment entering a cove of Tellico Lake below lots 220/221 of the original site, eroding hillsides and filled or failing sediment traps at several locations. A digital photographic record of these violations was forwarded to the Respondent Tellico Landings, LLC together with a Notice of Violation on October 18, 2006

XXXV.

In the course of investigating this matter the Division incurred damages in the amount of TWO THOUSAND TWENTY THREE DOLLARS AND FIFTEEN CENTS (\$2,023.15).

VIOLATIONS

XXXVI.

In failing to install and maintain adequate sediment and erosion control measures to control storm water runoff as required by the TNCGP, as described herein, the Respondents have violated T.C.A. §69-3-108(b) and §69-3-114(b).

T.C.A. §69-3-108(b) states:

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;
- (6) The discharge of sewage, industrial wastes, or other wastes into water, or a location from which it is likely that the discharged substances will move into waters;

T.C.A. §69-3-114(b) states:

- (b) In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in §69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

XXXVII.

By conducting activities without a permit as described herein, the Respondents have violated T.C.A. § 69-3-108(a).

T.C.A. § 69-3-108(a) states:

- (a) Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.

XXXVIII.

By causing a condition of pollution to waters of the state, as described herein, the Respondents have violated T.C.A. § 69-3-114(a).

T.C.A. §69-3-114(a) states:

- (a) It shall be unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

T.C.A. §69-3-103(22) provides:

(22) "Pollution" means such alteration of the physical, chemical, biological, bacteriological, or radiological properties of the waters of this state including but not limited to changes in temperature, taste, color, turbidity, or odor of the waters:

- (A) As will result or will likely result in harm, potential harm or detriment of the public health, safety, or welfare;
- (B) As will result or will likely result in harm, potential harm or detriment of the health of animals, birds, fish or aquatic life;
- (C) As will render or will likely render the waters substantially less useful for domestic, municipal, industrial, recreational, or other reasonable uses; or
- (D) As will leave or will likely leave the waters in such condition as to violate any standards of water quality established by the board.

ORDER AND ASSESSMENT

XXXIX.

WHEREFORE, pursuant to the authority vested by T.C.A. §§69-3-109, 69-3-115 and 69-3-116, I, James H. Fyke, hereby issue the following ORDER and ASSESSMENT to the Respondents:

1. The Respondents shall, within 7 days of receipt of this Order, seed and straw the disturbed areas of the site currently without vegetative cover until implementation of appropriate erosion prevention and sediment control measures designed by a professional engineer or other qualified professional to assure that no additional material leaves the site and enters waters of the state, including, but not limited to, utilization of polyacrylamide products upstream of sediment retention structures. Check dams and basins should be reconfigured so that they will hold water, such as by utilizing geotextile as an interior lining on the stone surfaces and bottoms of the basins or channels to prevent seepage and leaks. Silt fence is not appropriate for use below outfalls where concentrated flow is leaving the site. Outfalls should be discharging clean water into armored/protected channels; if the discharge contains sediment, it should enter a treatment device such as a sediment trap or basin
2. Documentation by photographs of the properly installed EPSCs shall be sent within 45 days of receipt of the Order, to the Division of Water Pollution Control manager located at the Knoxville Environmental Field Office, 3711 Middlebrook Pike, Knoxville, Tennessee 37921.
3. The Respondents shall maintain appropriate erosion prevention and sediment control measures to assure that no additional material leaves the site and enters waters of the state. These professionally designed controls shall be maintained until final grade and permanent erosion preventive cover is established, including

but not limited to, healthy grass and vegetation, pavement, buildings, hardened paths, and heavily mulched areas.

4. The Respondents shall, within 14 days of receipt of this Order, submit an updated SWPPP and applications for any TVA and USACOE permits required for removal of sediment from Tellico Lake along Taffrail Drive and any other location where major sediment deposition has taken place, such as below the pump house (removal vs. restoration in place to be at the discretion of TVA and USACOE).
5. The Respondents shall, within 30 days of receipt of this Order, submit for review and approval a restoration plan and map showing all the locations at which sediment has encroached on neighboring property, including TVA land. The Respondents have stated that discussions with TVA have taken place regarding leaving some of these areas alone to be overtaken by native growth. This submittal is to be formal documentation of the proposed course of action for each location at which damage has taken place to waters of the state and/or non-Rarity Pointe properties.

The restoration plan shall include a time schedule to identify proposed activity dates required to complete the work. This plan shall be submitted to the Division of Water Pollution Control manager located at the Knoxville Environmental Field Office, at the address above, and a copy of each shall also be mailed to the manager of the Enforcement & Compliance Section, Division of Water Pollution

Control, Tennessee Department of Environment and Conservation, 401 Church Street, L&C Annex 6th Floor, Nashville, TN 37243.

6. The Respondents shall, within ninety (90) days of written approval from the Division, implement the restoration plan. This shall be confirmed in writing and by photographs submitted to the Division at the Knoxville Environmental Field Office and copied to the Division of Water Pollution Control, Enforcement and Compliance Section, at the addresses above.
7. Each Respondent shall, within 1 year of receipt of this Order, provide documentation of attendance and successful completion of the Department's Erosion Prevention and Sediment Control Workshop for all employees who manage or oversee construction projects, to the Division at the Knoxville Environmental Field Office and copied to the manager of the Enforcement & Compliance Section, Division of Water Pollution Control in Nashville at the address previously provided.
8. The Respondents shall pay a CIVIL PENALTY of THREE HUNDRED AND FORTY THOUSAND SIX HUNDRED DOLLARS (\$340,600.00) to the Department, hereby ASSESSED to be paid as follows:
 - (a) The Respondents shall, within 30 days of receipt of this ORDER AND ASSESSMENT, pay a CIVIL PENALTY in the amount of ONE HUNDRED TWENTY SEVEN THOUSAND NINE HUNDRED DOLLARS (\$127,900.00).
 - (b) In the event the Respondents fail to comply with item one above in a timely manner, the Respondents shall submit a CIVIL PENALTY payment in the amount of THIRTY NINE THOUSAND DOLLARS (\$39,000.00), payable within 30 days of such default.

(c) In the event the Respondents fail to comply with item two above in a timely manner, then the Respondents shall submit a CIVIL PENALTY payment in the amount of FIFTEEN THOUSAND SIX HUNDRED DOLLARS (\$15,600.00), payable within 30 days of such default.

(d) In the event the Respondents fail to comply with item three above in a timely manner, then the Respondents shall submit a CIVIL PENALTY payment in the amount of THIRTY NINE THOUSAND DOLLARS (\$39,000.00), payable within 30 days of such default.

(e) In the event the Respondents fail to comply with item four above in a timely manner, then the Respondents shall submit a CIVIL PENALTY payment in the amount of THIRTEEN THOUSAND DOLLARS (\$13,000.00), payable within 30 days of such default.

(f) In the event the Respondents fail to comply with item five above in a timely manner, then the Respondents shall submit a CIVIL PENALTY payment in the amount of THIRTY NINE THOUSAND DOLLARS (\$39,000.00), payable within 30 days of such default.

(g) In the event the Respondents fail to comply with item six above in a timely manner, then the Respondents shall submit a CIVIL PENALTY payment in the amount of FIFTY TWO THOUSAND DOLLARS (\$52,000.00), payable within 30 days of such default.

(h) In the event the Respondents fail to comply with item seven above in a timely manner, then the Respondents shall submit a CIVIL PENALTY payment in the amount of THIRTEEN THOUSAND DOLLARS (\$13,000.00), payable within 30 days of such default.

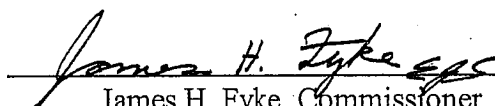
(i) The Respondents shall pay DAMAGES of TWO THOUSAND TWENTY THREE DOLLARS AND FIFTEEN CENTS (\$2,023.15) to the Department, hereby assessed, to be paid within thirty (30) days of receipt of this Order.

The Director of the Division of Water Pollution Control may, for good cause shown, extend once, for a fixed time period, the compliance dates contained within this Order. In order to be eligible for this time extension, the Respondents shall submit a written request to be received a minimum of 30 days in advance of the compliance date. The request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension will be in writing. Should the Respondents fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.

The Respondents shall otherwise conduct their business in accordance with the Act and rules promulgated pursuant to the Act. On all land disturbance activities in the state of Tennessee during the next 24 months after the effective date of this Order, including new phases within any current development, the Respondents shall submit *EPA Application Form 1 General Information and Application Form 2F* (enclosed) for coverage under an individual NPDES permit for discharge of stormwater to the Division of Water Pollution Control manager located at the Knoxville Environmental Field Office, 3711 Middlebrook Pike, Knoxville, Tennessee 37921 and a copy shall also be mailed to the manager of the Permit Section, Division of Water Pollution Control, Tennessee Department of Environment and Conservation, 401 Church Street, L&C Annex 6th Floor, Nashville, TN 37243.

Further, the Respondents are advised that the foregoing ASSESSMENT and ORDER is in no way to be construed as a waiver, expressed or implied, of any provision of law or regulations. However, compliance with the Order will be one factor considered in any decision whether to take enforcement action against the Respondents in the future. Failure to comply with this order will result in additional penalties.

Issued by the Commissioner of the Tennessee Department of Environment and Conservation on this 13th day of April 2007.


James H. Fyke, Commissioner
Department of Environment and Conservation

NOTICE OF RIGHTS

Tennessee Code Annotated §§ 69- 3-109 and 69 – 3-115, allow the Respondents to secure review of this ORDER AND ASSESSMENT. In order to secure review of this ORDER AND ASSESSMENT, the Respondents must file with the director at the address below a written petition setting forth each of Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondents must file the written petition within thirty (30) days of receiving this ORDER AND ASSESSMENT.

If the required written petition is not filed within thirty (30) days of receipt of this ORDER AND ASSESSMENT, the ORDER AND ASSESSMENT shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the ORDER AND ASSESSMENT will not be subject to review pursuant to Tenn. Code Ann. §§ 69-3-109 and 69-3-115.


Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by Tenn. Code Ann. § 4-5-301 *et seq.* (the Uniform Administrative Procedures Act.) and the Dept. of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondents may subpoena witnesses on its behalf to testify.

It is the Department's position that corporations, limited partnerships, limited liability companies, and other artificial entities created by law must be represented in any legal proceeding resulting from an appeal of this Order and Assessment by an attorney licensed to practice law in the state of Tennessee. Non-attorneys may participate in any such proceeding to the extent allowed by law.

Payments of the civil penalty shall be made payable to the "Treasurer, State of Tennessee". All correspondence, including civil penalty payments, should be addressed to Sam Wallace, Assistant General Counsel, Tennessee Department of Environment and

Conservation, 20th Floor L & C Tower, 401 Church Street, Nashville, TN 37243-1548.

Please write your case number, 06-0368, on all payments and all correspondence concerning this matter.

Sam Wallace 

III.

Rarity Communities, Inc., is an active corporation licensed to conduct business in the state of Tennessee (hereinafter "Respondent Rarity Communities"), and is contracted by Respondent Oak Ridge to conduct construction activities at the site. Service of process may be made on Respondent Rarity Communities through, Michael L. Ross, Registered Agent, at 2624 Carpenters Grade Road, Maryville, Tennessee 37803.

IV.

Gary Consorto (hereinafter "Respondent Consorto") is a resident of the state of Tennessee and is the signatory authority for Respondent Oak Ridge and Respondent Rarity Communities and is listed as Vice President, Construction for those Respondents. Service of process may be made on Respondent Consorto at 335 Rarity Bay Parkway, Vonore, Tennessee, 37885.

JURISDICTION

V.

Whenever the Commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) § 69-3-101 *et seq.*, the Water Quality Control Act (the "Act"), has occurred, or is about to occur, the Commissioner may issue a complaint to the violator and the Commissioner may order corrective action be taken pursuant to T.C.A. § 69-3-109(a) of the Act. Further, the Commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. § 69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. § 69-3-116 of the Act. Department Rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. § 69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (the "Rule"). Pursuant to T.C.A. § 69-3-107(13), the Commissioner may delegate to the Director any of the powers, duties, and responsibilities of the commissioner under the Act. Paul E. Davis is duly

appointed by the Commissioner as Director (hereinafter the "Director") of the Division of Water Pollution Control (hereinafter the "Division").

VI.

The Respondents are "persons" as defined by T.C.A. § 69-3-103(20) and as herein described, have violated the Act.

VII.

Tennessee Code Annotated § 69-3-108 requires a person to obtain coverage under a permit from the Department prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substance will move into waters of the state. Coverage under the general permit for Storm Water Discharges Associated with Construction Activity (hereinafter the "TNCGP") may be obtained by submittal of a Notice of Intent (NOI). Pursuant to T.C.A. § 69-3-108, Rule 1200-4-7-.04 requires a person to submit an application prior to engaging in any activity that requires an Aquatic Resource Alteration Permit (ARAP) that is not governed by a general permit or a § 401 Water Quality Certification. No activity may be authorized unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value.

VIII.

East Fork Poplar Creek and Pinhook Branch are "waters of the state", as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, *Use Classifications for Surface Waters*, is contained in the *Rules of Tennessee*.

Department of Environment and Conservation Division of Water Pollution Control Amendments.

Accordingly, these waters of the state are classified for the following uses: fish and aquatic life, recreation, irrigation, livestock watering and wildlife. Additionally, East Fork Poplar Creek is listed as being impaired due to siltation.

FACTS

IX.

On April 6, 2006, Respondent Oak Ridge submitted an application package requesting written ARAP authorization to construct a minor road crossing over East Fork Poplar Creek. The Division issued written authorization for this activity on May 2, 2006. This application was subsequently revised based on the presence of contaminated soils in the area of the proposed minor road crossing. On May 24, 2006, the Division received an NOI and Storm Water Pollution Prevention Plan (SWPPP) requesting a Notice of Coverage (NOC) be issued under the TNCGP for construction activities at the site. Respondent Consorto is the signatory authority on this NOI for site owner/developer Respondent Oak Ridge.

X.

On June 28, 2006, Division personnel conducted a site investigation to identify any potential waters of the state prior to NOC issuance, and noted that extensive land disturbance activities were underway with no Erosion Prevention and Sediment Control measures (EPSC) in place. Additionally, Division personnel noted that a spring-fed stream had been partially excavated. Division personnel met with representatives of Respondent Rarity Communities and representatives of Sterling Engineering, Inc., pointed out the spring at Lat. N 35°58'05"/Long W

84°20'28.1", and suggested corrective actions to address the excavated stream and the areas surrounding it.

XI.

On July 12, 2006, the Division issued a Notice of Violation (NOV) to Respondents Oak Ridge and Consorto for the violations observed during the June 28, 2006, site investigation. The NOV reiterated the requirement of obtaining TNCGP and ARAP coverage prior to engaging in the types of activities observed during the June 28, 2006, site investigation, and instructed Respondents Oak Ridge and Consorto to restore the affected stream and spring. The NOV further instructed the Respondents to discuss these issues with equipment operators and other personnel.

XII.

On July 31, 2006, the Division issued a NOC for construction activities at the site. On August 4, 2006, Respondent Rarity Communities submitted an amended NOI as primary contractor for the site. Respondent Consorto signed the amended NOI as the representative of Respondent Rarity Communities.

XIII.

On March 1, 2007, Division personnel inspected the site during a rain event and noted plumes of sediment-laden water for several hundred yards downstream of the site in both Pinhook Branch and East Fork Poplar Creek. These plumes originated at various storm water outfall points of the site. Division personnel noted that inadequate EPSC measures were allowing

sediment deposition into Pinhook Branch and East Fork Poplar Creek from these outfall points as well as at other locations within the site. Inadequate EPSC measures at the minor road crossings of Pinhook Branch and East Fork Poplar Creek were allowing eroded material to migrate directly into the streams at those locations. The NOC, SWPPP and EPSC inspection reports were not available on site as required by the TNCGP. Division personnel met with a representative of Respondent Oak Ridge and pointed out the violations. Photographs of some of the relevant areas were taken and copies were later forwarded as attachments to the March 20, 2007 NOV.

XIV.

On March 20, 2007, the Division issued an NOV to the Respondents for the violations observed during the March 1, 2007, site inspection. The NOV advised the Respondents that the site would be re-inspected during April of 2007 to determine if the violations of March 1, 2007, had been corrected.

XV.

On April 10, 2007, Division personnel conducted an inspection at the site and noted little improvement in the EPSC measures. Division personnel pointed out the continuing deficiencies to representatives of the Respondents and left a copy of the division inspection report detailing these deficiencies with the site supervisor for the Respondents.

XVI.

During the course of investigating the activities of the Respondents, the Division incurred damages in the amount of FOUR HUNDRED EIGHTY SIX DOLLARS AND TWENTY CENTS (\$486.20).

VIOLATIONS

XVII.

By altering waters of the state without coverage under an ARAP and by conducting land disturbance activities without coverage under the TNCGP, the Respondents have violated T.C.A.

§§ 69-3-108(a)-(b), 114(b), which state in part:

§ 69-3-108(a):

Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.

§ 69-3-108(b):

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any Waters of the State;
- (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;
- (6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;

§ 69-3-114(b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

XVIII.

By failing to properly install and maintain erosion prevention and sediment control measures prior to land disturbance, the activity described herein did or was likely to cause an increase in the discharge of wastes into the waters of the state. Therefore, the Respondents have violated T.C.A. Sections 69-3-108(b) and 69-3-114(b) as referenced above.

XIX.

By discharging materials or wastewater without coverage under a permit, the Respondents have violated T.C.A. Sections 69-3-108(a) and (b) and 69-3-114(b) as referenced above.

XX.

By altering waters of the state without authorization under an ARAP, the Respondents have violated T.C.A. Sections 69-3-108(a) and (b) and 69-3-114(b) as referenced above.

XXI.

By causing a condition of pollution to Pinhook Branch and East Fork Poplar Creek, the Respondents have violated T. C. A. Section 69-3-114(a).

T.C.A. § 69-3-114(a) states:

It shall be unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an

unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

ORDER AND ASSESSMENT

XXII.

WHEREFORE, pursuant to the authority vested by T.C.A. §§ 69-3-109, 69-3-115 and 69-3-116, I, James H. Fyke, hereby issue the following ORDER AND ASSESSMENT to the Respondents.

1. The Respondents shall, within 30 days of receipt of this ORDER, submit an updated SWPPP, showing the methods proposed to establish effective EPSC measures on-site and to implement Best Management Practices as outlined in Tennessee Erosion and Sediment Control Handbook such that sediment is not allowed to leave the site or enter waters of the state. These measures shall consist of, but not be limited to, establishing vegetative cover, redesign of basins and basin outfalls, and the installation of rock check dams and silt fences. These EPSC measures shall be designed by a professional engineer licensed in the state of Tennessee or a landscape architect licensed in the state of Tennessee, shall be approved by the Water Pollution Control Manager in the Knoxville Environmental Field Office (hereinafter K-EFO) and shall be maintained until all land disturbances at the site are complete and erosion-preventive permanent cover is established. The Respondents shall submit this updated SWPPP to the Water Pollution Control Manager in the K-EFO at 3711 Middlebrook Pike, Suite 220, State Plaza, Knoxville, Tennessee 37921, and shall submit a copy to the Water Pollution Control Enforcement and Compliance (E&C) Section Manager, at 401 Church Street, 6th Floor L&C Annex, Nashville, Tennessee 37243-1534.

2. The Respondents shall, within 60 days of approval of the activities outlined in item 1 above, complete those activities and submit photographic and written documentation of the completion of those activities to the Water Pollution Control Manager in the K-EFO and shall submit a copy of the documentation to the E&C Section, at the respective addresses shown in item 1, above.
3. The Respondents shall, within 30 days of submission of the updated SWPPP as outlined in item 1 above, submit a Corrective Action Plan (CAP) to the Division. This plan shall be developed by a professional engineer licensed in the state of Tennessee or a landscape architect licensed in the state of Tennessee, or other professional with experience in the design and implementation of such activities and shall;
 - a. Detail the manual methods to be used for the removal of the accumulated sediment from Pinhook Branch and East Fork Poplar Creek.
 - b. Detail the proposed restoration of the excavated section of the spring fed tributary.

The CAP shall be submitted to the Water Pollution Control Manager in the K-EFO and a copy to the E&C Section at the respective addresses shown in item 1, above. Any deficiencies shall be corrected by the Respondents with 30 days of notification of those deficiencies and the revised CAP resubmitted to the Water Pollution Control Manager in the K-EFO and a copy resubmitted to the E&C Section, at the respective addresses shown in item 1, above.

4. The Respondents shall, within 90 days of written approval from the Water Pollution Control Manager in the K-EFO, complete all activities outlined in the CAP and submit photographic and written documentation of completion of those activities to the Water

Pollution Control Manager in the K-EFO and a copy of the documentation to the E&C Section, at the respective addresses shown in item 1, above.

5. The Respondents shall commence no other land disturbance activities at the site except those activities that are required in order to achieve compliance with the requirements of the TNCGP. Once compliance has been achieved and the site is stabilized, additional land disturbance activities may resume following written approval by the Water Pollution Control Manager in the K-EFO.
6. The Respondents shall, within six months of receipt of this Order and Assessment, provide documentation of attendance and successful completion of the department's Erosion Prevention and Sediment Control Workshop, for all employees who manage or oversee construction projects to the K-EFO and a copy to the E&C Section at the respective addresses shown in item 1, above. Information may be found on the program website at <http://www.tnepsc.org/>.
7. The Respondents shall pay DAMAGES to the division in the amount of FOUR HUNDRED EIGHTY SIX DOLLARS AND TWENTY CENTS (\$486.20).
8. The Respondents shall pay a CIVIL PENALTY of ONE HUNDRED EIGHT THOUSAND DOLLARS (\$108,000.00) to the division, hereby ASSESSED to be paid as follows:

- a. The Respondents shall, within 30 days of entry of this ORDER, pay a CIVIL PENALTY in the amount of THIRTY THREE THOUSAND DOLLARS (\$33,000.00).
- b. If the Respondents fail to comply with Part XXII, item 1 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of TWELVE THOUSAND DOLLARS (\$12,000.00), payable within 30 days of default.
- c. If the Respondents fail to comply with Part XXII, item 2 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of FIFTEEN THOUSAND DOLLARS (\$15,000.00), payable within 30 days of default.
- d. If the Respondents fail to comply with Part XXII, item 3 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of TWELVE THOUSAND DOLLARS (\$12,000.00), payable within 30 days of default.
- e. If the Respondents fail to comply with Part XXII, item 4 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of FIFTEEN THOUSAND DOLLARS (\$15,000.00), payable within 30 days of default.
- f. If the Respondents fail to comply with Part XXII, item 5 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of FIFTEEN THOUSAND DOLLARS (\$15,000.00), payable within 30 days of default.
- g. If the Respondents fail to comply with Part XXII, item 6 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of SIX THOUSAND DOLLARS (\$6,000.00), payable within 30 days of default.

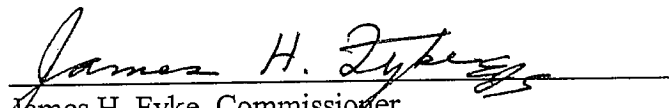
The Respondents shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The Director may, for good cause shown, extend the compliance dates contained within this ORDER. In order to be eligible for this time extension, the Respondents shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. The grant of any such extension by the Director will be in writing. Should the Respondents fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.

Further, the Respondents are advised that the foregoing ORDER is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the ORDER will be one factor considered in any decision whether to take enforcement action against the Respondent in the future.

Payment of the civil penalty shall be made to "Treasurer, State of Tennessee" and shall be sent to Sam Wallace, Assistant General Counsel, Tennessee Department of Environment and Conservation, 20th Floor L & C Tower, 401 Church Street, Nashville, TN 37243-1548. The case number, shown on the first page of this Order and Assessment, should be included on or with the payment.

Issued by the Commissioner of the Tennessee Department of Environment and Conservation on this 12th day of June, 2007.


James H. Fyke, Commissioner
Tennessee Department of Environment and
Conservation

NOTICE OF RIGHTS

Tennessee Code Annotated §§ 69-3-109 and 69-3-115, allow any Respondent to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondent must file with the director at the address below a written petition setting forth each Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within THIRTY (30) DAYS of receiving this Order and Assessment.

If the required written petition is not filed within THIRTY (30) DAYS of receipt of this Order and Assessment, the Order and Assessment shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the Order and Assessment will not be subject to review pursuant to T.C.A. §§ 69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. § 4-5-301 *et seq.* (the Uniform Administrative Procedures Act) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.


If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization. It is the Department's position that corporations, limited partnerships, limited liability companies, and other artificial entities created by law must be represented in any legal

proceeding resulting from an appeal of this Order and Assessment by an attorney licensed to practice law in the state of Tennessee.

At the conclusion of a hearing the Board has the authority to affirm or modify, or deny the Order and Assessment. This includes the authority to modify the penalty within the statutory confines (up to \$10,000.00 per day per violation).

Furthermore, in the event the Board finds that the Respondent is responsible for the alleged violations after a hearing, the Board has the authority to assess additional damages incurred by the Department including, but not limited to, all docketing expenses associated with the setting of the matter for a hearing and the hourly fees incurred due to the presence of an administrative law judge and a court reporter.

Any petition to appeal which is filed should also be sent to Sam Wallace, Assistant General Counsel at the above listed address. All other correspondence shall be sent to Paul E. Davis, Director, Division of Water Pollution Control, Tennessee Department of Environment and Conservation, 6th Floor L & C Annex, 401 Church Street, Nashville, TN 37243.

A handwritten signature in cursive script, appearing to read "Sam Wallace", is written over a horizontal line.

Assistant General Counsel
Tennessee Department of
Environment & Conservation
401 Church Street, L&C Tower 20th Floor
Nashville, Tennessee 37243-1548